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No. 03-1027

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RUMSFELD, SECRETARY OF DEFENSE, *Petitioner*
v.
JOSE PADILLA; DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS LISTED HEREIN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Circuit Court's opinion in this case is generally appropriate, with one major issue insufficiently developed (as explained in Part II.A. herein) The District Court's opinions in this case (and the district court's and Circuit panel's in *Hamdi v. Rumsfeld*) contained certain errors, misstatements and improper standards that, if considered, are of grave and pressing concern with respect to the right of all persons under international law to independent, fair, effective, and meaningful judicial review of the propriety of their detention and, similarly, with respect to numerous and predominant trends in U.S. judicial decisions (see especially Part III.C herein). Human rights and other international laws are also relevant to the content and contours of the Fifth Amendment to the U.S. Constitution and to congressional and Executive powers relevant to this petition. *Padilla* and *Hamdi* are now both partly before this Court and any errors and improper standards, if accepted, could have serious and unwanted consequences. *Amici curiae*, the international law professors named below, include the *Amici* in *Padilla* before the Second Circuit or other professors who have lectured and/or published widely on these and related matters.[1] This *amicus* memorandum sets forth their considered views. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools. The affiliations of *amici* are listed in the appendix.

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[1]Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Circuit Court's opinion in this case is generally correct, although needing further analysis concerning relevant congressional powers, as considered in Part II.A. herein. The District Court in this case, however, had made certain errors and misstatements concerning appropriate legal standards of review of the propriety of detention (see Part III.C) that, if accepted, could have serious unwanted consequences. The District Court had been correct, however, in affirming that there must be judicial review of the propriety of the detention of Jose Padilla by the Executive branch and access to a lawyer for such purpose. Human rights and other international laws, which bind the United States and are part of the law of the United States in various ways, prohibit arbitrary detention and require independent, fair, and effective judicial review. The status of Mr. Padilla (*e.g.*, as detainee, enemy combatant, or unlawful combatant) will not obviate the reach of relevant human rights and other international legal rights, nor would it limit the reach of the Fifth Amendment to a U.S. citizen. The U.S. judiciary has the power and responsibility under international law, Article III of the U.S. Constitution, and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms, to determine the legal status and rights of persons detained by the Executive. The meaning of the Fifth Amendment to the U.S. Constitution is also informed by customary and treaty-based human rights to due process, including access to courts and to judicial review of the propriety of detention.

ARGUMENT

I. There Must Be Judicial Review of the Propriety of Detention

Under international law and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms, there are legal limits to the power to detain persons without trial. Contrary to claims by the Administration, judicial review of the propriety of detention must be made available and no legal standard of review permits complete deference to Executive determinations with respect to the legal status and rights of persons detained without trial. See Parts II & III below. It bears emphasis that nothing in the U.S. Constitution or in relevant international law authorizes suspension indefinitely of constitutional rights applicable to a U.S. citizen on the mere allegation or determination of status by members of the Executive branch.

II. Human Rights Law Prohibits Arbitrary Detention and Requires Judicial Review

A. International Human Rights Law Prohibits Arbitrary Detention

Under international law, which is part of the law of the United States in several ways (see Part III.A & B), tests concerning the propriety of detention include relevant human rights standards that are both treaty-based and part of customary international law; and they are applicable in times of both peace and war. Human rights standards

recognized in nearly all major human rights instruments include the fundamental prohibition of "arbitrary" arrest or detention of individuals. *See, e.g.*, *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1328-29, 1344, 1349-50, 1352, 1357-58, 1360 (N.D. Ga. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798-800 (D. Kan. 1980); *infra* note 3; Report of the Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, para. 64, p.20, Comm'n on Hum. Rts., 59th sess., item 11(a) of provisional agenda, E/CN.4/2003/8 (Dec. 16, 2002), available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c58095e9f8267e6cc1256cc60034de72?Opendocument; Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 505-07 (2003) [hereinafter Paust, *Judicial Power*].

As an example, Article 9(1) of the International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171[hereinafter ICCPR], a treaty ratified by the U.S., requires: "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Among other relevant and binding human rights instruments is the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.L./V./I.4, rev. (1965), which is now a legally

authoritative indicia of human rights protected through Article 3(k) of the O.A.S. Charter, a treaty of the United States, done April 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2631, amended by the Protocol of Buenos Aires, done 27 Feb. 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [*see also id.* arts. 44, 111]. *See, e.g.*, Advisory Opinion OC-10/89, Inter-Am. Court H.R., (ser. A) No. 10, para. 45 (14 July 1989); Inter-American Comm. on Human Rights, Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VII (1996), O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10, rev. 1 (April 24, 1997) ("The American Declaration...continues to serve as a source of international obligation for all member states...."); *see also* American Convention on Human Rights, preamble and art. 29(d), Nov 12, 1969,1144 U.N.T.S. 123, O.A.S. T.S. No. 36. Article XXV of the Declaration assures: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."

Whether Mr. Padilla is a peacetime detainee, a wartime "enemy combatant" detained in the U.S., or a so-called unlawful combatant detained in the U.S., is ultimately unimportant, because every person has a fundamental human right to freedom from arbitrary detention, every person has a fundamental and peremptory human right to judicial review of the propriety of detention (see next section), and customary human rights to due process are incorporated through common Article 3 of the 1949 Geneva Conventions and apply to any person who is detained during an armed conflict regardless of personal status. *See, e.g.*, Paust, *Judicial Power*, *supra*, at 505-14 & ns.27, 29 (demonstrating that common Article 3 applies to all detainees, also provides minimum guarantees in an international armed conflict, and

incorporates customary human rights to due process as among "all the judicial guarantees which are recognized as indispensable by civilized peoples"). Similarly, the President has no power to suspend application of the Constitution, especially the Fifth Amendment, to a U.S. detainee regardless of the status of such a person and regardless of the President's provisional characterization. See Part III.B.

The Second Circuit panel in *Padilla* ruled that 18 U.S.C. § 4001(a) (2000) (the 1971 "Non-Detention" Act) precluded Executive detention of U.S. citizens because the Act requires that U.S. citizens shall not be "detained by the United States except pursuant to an Act of Congress" and that no such legislation exists. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), quoting § 4001(a). We agree, although the analysis was incomplete, given the authority under treaty law of the United States to detain certain persons under certain circumstances. First, the 1971 congressional limitation of authority to detain should be interpreted consistently with 1949 treaty-based authority to detain outlined in Article 5 of the Geneva Civilian Convention, 75 U.N.T.S. 287. When a clash between the two is unavoidable, there must be a clear, unequivocal intent of Congress to override prior treaty law for the legislation to prevail under the last-in-time rule (which is not evident from the face of the 1971 legislation or legislative history addressed by the Second Circuit panel). *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 352 (1984); *Cook v. United States*, 288 U.S. 102, 120 (1933); Jordan J. Paust, *International Law as Law of the United States* (2d ed. 2003) [hereinafter Paust, *International Law*], at 99, 101, 120, 125 n.3, and other cases cited. Even when such an intent can be demonstrated, there are Supreme Court-based exceptions to

the last-in-time rule that assure the primacy of treaty law and one such exception requires that the law of war (at least duties and rights thereunder) prevail. *See, e.g.*, Paust, *International Law*, *supra*, at 99-107, 120, and cases cited. More generally, presidential power can be enhanced by international law since the President must faithfully execute law, including international law, and the duty creates a competence to do so. *See, e.g.*, *id.* at 9, 16, 44-47, 79, 82, 88, 180, 185, 457, 468-69, 480-81. Following this approach, it might be argued that the President's authority to detain under Geneva law prevails over the 1971 Act.

Nonetheless, following the reasoning of cases such as *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814), the competence of the United States to detain certain persons under Articles 5, 42, and 78 of the Geneva Civilian Convention is only exercisable by Congress. In *Brown*, the majority recognized that the laws of war created a competence for the United States to seize enemy property located within the U.S. but held that such a competence must be exercised by Congress. In dissent, Justice Story suggested that the President could execute that competence since all were in agreement that the President was bound to execute the law of war during a war declared by Congress and Congress had set no legislative limits on the President's power to execute such laws or to carry on the war. *Id.* at 145, 149, 153. Even if one follows Story's approach, however, Congress has clearly set a limit on the power to detain U.S. persons and the congressional limit would prevail. This Court has recognized that Congress does have power to place certain limits on the exercise of presidential powers during war and occupation. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.)

("restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602, 609-10 (1952) (Frankfurter, J., concurring); *id.* at 635-36 n.2, 654-55 (Jackson, J., concurring); *id.* at 659-60 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring); *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909) (limits during occupation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Congress has power to "conduct a war"); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-28 (1814) (re: seizure of ships abroad); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (re: seizure of property here); *The Flying Fish*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (re: seizure of ships abroad); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (same); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-42 (1800) (same); *United States v. Smith*, 27 F. Cas. 1192, 1228-31 (C.C.D.N.Y. 1806) (Paterson, J., on circuit) (use of force abroad); 9 Op. Att'y Gen. 516, 518-19 (1860) (Congress can limit use of "land and naval forces" that are otherwise "under his orders as their commander-in-chief"); see also U.S. Const., art. I, §8, cls. 11 (Congress has power to "make Rules concerning Captures on Land and Water"), 14, 18. Recognition that the Geneva Conventions prevail over the 1971 legislation would not answer the question whether it is Congress or the Executive that has the power to exercise a treaty-based competence on behalf of the United States to detain certain persons even though the Executive is bound to comply with duties and rights based in Geneva law (and, similarly, Congress cannot abrogate duties or rights or authorize their infraction, *see, e.g.*, Paust, *International Law*, *supra*, at 106-07, 109), nor would it answer the question whether congressional power exists to set limits and, thus,

has primacy, in case the power to detain is generally shared. The *Prize Cases*, 67 U.S. (2 Black) 635 (1862), are not inconsistent because, in earlier legislation, Congress had specifically authorized the use of force in response to invasions or insurrections and had placed no other limits in the legislation. Ultimately, we agree that Congress has appropriately set a limit.

B. International Human Rights Law Requires Independent, Fair, and Effective Judicial Review

When a person is detained by a state, human rights law requires the availability of judicial review of the propriety of detention. *See, e.g,* Paust, *Judicial Power*, *supra,* at 507-10, and references cited. For example, as mandated in Article 9(4) of the International Covenant on Civil and Political Rights, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[2] Access to courts for judicial

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[2]Under a U.S. Senate declaration during ratification, if legally operative, the ICCPR would be partly (not fully) non-self-executing. Several *amici* consider the Senate declaration to be either void *ab initio* as a matter of law (since it is inconsistent with the object and purpose of the Covenant – *see, e.g.*, Restatement of the Foreign Relations Law of the United States §313(1)(c) & cmt. c (3ed. 1987); Vienna Convention on the Law of Treaties, May 22, 1969, art. 19(c), 1155 U.N.T.S. 131; Reservations to the Convention on Genocide, [1951] I.C.J. 15, 21) or inoperative because it would not be compatible with the Supremacy Clause, U.S. Const. art. VI, cl.2). In any event, the declaration expressly did not inhibit the reach of Article 50 (which mandates in self-executing terms that all "[t]he

determination of rights, minimum customary due process guarantees, and the right to an effective remedy are also guaranteed more generally under Article 14(1) of the ICCPR, as supplemented by General Comments of the Human Rights Committee created by the Covenant, and Articles XVIII and

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provisions shall extend to all parts of federated States without any limitations or exceptions.") and the Executive intended only that the ICCPR "not create a private cause of action directly under the treaty." *U.S. Sen. Exec. Rep. 102-23*, 31 I.L.M. 645, 648 (102d Cong, 2d Sess, 1992). Also, the ICCPR can be used for other purposes (*e.g.*, defensively or indirectly through constitutional amendments or statutes), and the habeas statute executes for habeas purposes any other relevant, partly non-self-executing provisions. *See, e.g.*, *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite declaration, ICCPR is supreme law of the land); *United States v. Duarte-Acero*, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively"); *United States v. Bakeas*, 987 F. Supp. 44 (D. Mass. 1997); Paust, Fitzpatrick, Van Dyke, *International Law and Litigation in the U.S.* 75-76, 193-94 (West Group 2000). In this case, Mr. Padilla uses the ICCPR defensively and as executed for habeas purposes by the habeas statute.

Alternatively, the right is also customary international law and, as such, is directly operative as law of the United States concerning individual rights, judicial power and responsibility, and Executive discretion. *See, e.g.*, *id.* at 110-33, 169-70, 244-60; Paust, *International Law, supra*, at 5-9, 143-46, and numerous cases cited. An express purpose of the habeas statute is to allow habeas review for any person "in custody in violation of...the laws or treaties of the United States." 28 U.S.C. § 2241.

XXV of the American Declaration.[3] *See, e.g.*, Paust, *Judicial Power*, *supra*, at 507-10.

The human rights standard concerning judicial review should involve contextual inquiry into whether detention is reasonably needed under the circumstances and, thus, is not arbitrary. However, under the Geneva Civilian Convention, detention of alien persons in the U.S. who pose threats to security during war must be "absolutely necessary." *Id.* art. 42; Paust, *Judicial Power*, *supra* at 512-14 & n.29 (*see also id.* at 518-25, concerning judicial review, and *id.* at 514-18 & ns.39-46, concerning private rights under and use of the Geneva Conventions for habeas and other purposes). Mr. Padilla, as a U.S. citizen, does not benefit from Article 42, but he does have all of the minimum customary human rights to due process (including judicial review of detention) through common Article 3 of the Geneva Conventions. *See, e.g.*, Paust, *Judicial Power*, *supra* at 510-14 & ns.27, 29.

> ...the Human Rights Committee [under the ICCPR] has recognized that freedom from arbitrary detention or arrest is a peremptory norm *jus cogens* (and is,

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[3]The Human Rights Committee is an authoritative body. "General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR" and are "authoritative." *Maria v. McElroy*, 68 F. Supp.2d 206, 232 (E.D.N.Y. 1999). *See United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) ("the Human Rights Committee has the ultimate authority to decide whether parties' clarifications or reservations have any effect."); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, para. 5 ("General comments...are intended... [among other purposes] to clarify the requirements of the Covenant...."); *see also United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12, 1287-88 (11th Cir. 2000). General comments can be found at http://www1.umn.edu/humanrts/gencomm.

thus, a right of fundamental and preemptive importance), has expressly declared that a state 'may not depart from the requirement of effective judicial review of detention,' and has affirmed that 'the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party's decision to derogate from the Convention.' Similarly, the Inter-American Court of Human Rights has recognized that judicial guarantees essential for the protection of nonderogable or peremptory human rights are also nonderogable in times of emergency, that the human right to be brought promptly before a judge must be subject to judicial control, and that judicial protection must include the right to habeas corpus or similar petitions and cannot be suspended during a time of national emergency. Finally, the European Court of Human Rights has recognized that detention by the Executive without judicial review of the propriety of detention is violative of fundamental human rights law. Such widespread recognition and the *jus cogens* nature of the right to freedom from arbitrary detention affirm the nonderogability of judicial review and therefore require that the executive branch may not exercise its discretion to detain without independent, fair, and effective judicial review. Indeed, it is difficult to imagine a more arbitrary system of detention than one involving an executive branch unbounded by law and whose decisions are not subject to effective judicial review.

Paust, *Judicial Power*, *supra*, at 507-10, and numerous references cited.

III. The Judiciary Has the Power and Responsibility to Determine the Legal Status and Rights of Detainees

The U.S. judiciary has the power and responsibility under international law, Article III of the U.S. Constitution, and numerous U.S. judicial decisions applying international law, the Bill of Rights, and other legal norms to determine the legal status and rights of persons detained.

A. Judicial Power Exists Under International Law and Article III of the Constitution

The Founders uniformly expected that the customary law of nations, like treaties, was binding, was supreme law, created private and governmental rights and duties, and would be applicable in U.S. federal courts.[4] At the time of the formation of the Constitution, John Jay had written:

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[4]For early views, including those of Bee, Bradford (Att'y Gen.), Chase, Duponceau, Hamilton, Ingersoll, Iredell, Jay, Jefferson, Lee (Att'y Gen.), Madison, Marshall, Mason, Nicholas, Paterson, Randolph (Att'y Gen.), Story, B. Washington, Wilson, Wirt (Att'y Gen.), *see, e.g.*, Paust, *International Law, supra*; *see also* Louis Henkin, *Foreign Affairs and the United States Constitution* 234, 510 n.20 (2ed. 1996); Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. Pa. L. Rev. 26, 35-38, 43-46, 48-49, 55-56 (1952); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1925, 1841, 1846, 1852 (1998).

"Under the national government...the laws of nations, will always be expounded in one sense...[and there is] wisdom...in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government...."[5] In 1792, Attorney General Randolph declared: "[t]he law of nations, although not specially adopted...is essentially a part of the law of the land."[6] In 1793, then Chief Justice Jay recognized that "the laws of the United States," the same phrase found in Article III, § 2, cl. 1 and in Article VI, cl. 2 of the Constitution, includes the customary "law of nations" and that such law was directly incorporable for the purpose of criminal sanctions.[7] That same year it was affirmed that the "law of nations is part of the law of the United States."[8] Chief Justice Jay had also charged a grand jury in Virginia that year in markedly familiar words: "The Constitution, the statutes of Congress, the law of nations, and treaties constitutionally made

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[5]*The Federalist No. 3*, at 62 (John Jay) (J.C. Hamilton ed. 1868).

[6]1 Op. Att'y Gen. 26, 27 (1792). See also 1 Op. Att'y Gen. 68, 69 (1797) ("the law of nations in its fullest extent...[is] part of the law of the land."). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815), cited in *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); Paust, *International Law, supra,* at 40 n.44, 41-42 n.45.

[7]*Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360); *see also id.* at 1103-04, 1112, 1115. *See also* Dickinson, *supra* note 3, at 46, 56 ("a constituent part of the national law of the United States...," adding: "the Constitution accepted the Law of Nations as national law...." *Id.* at 48); Paust, *International Law, supra,* at 6-8, 34 n.38, 40-48 ns.44-57.

[8]*United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793).

compose the laws of the United States."[9] In 1795, Justice Iredell addressed direct incorporation of customary international law and affirmed the fact of incorporation with or without a statutory base: "[t]his is so palpable a violation of our own law...of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since...." *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.). *See also* 1 Op. Att'y Gen. 566, 570-71 (1822) (law of nations is part of "the laws of the country" and "our laws"). With respect to the broad range of matters subject to incorporation, he added: "all...trespasses committed against the general law of nations, are enquirable...." *Id.* An early case had also expressly related the duty to incorporate customary international law to the Constitution: "courts... [i]n this country...are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply." *Waite v. The Antelope*, 28 F. Cas. 1341, 1341 (D.C.D. S.Car. 1807) (No. 17,045). Later, Chief Justice Marshall affirmed that our judicial tribunals "are established ...to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810), and human rights precepts have been used since the dawn of the U.S. *See, e.g.*, Paust, *Judicial Power, supra*, at 167-96.

Similar recognitions had occurred previously and would occur throughout our history, demonstrating that application of international law in cases otherwise properly before the courts is emphatically within the province of judicial power and the original intent of the Framers. Quotations from merely a few other Supreme Court decisions round out such recognitions. For example, in 1942 the

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[9]Charge to Grand Jury for the District of Virginia, May 22, 1793.

Supreme Court summarized its practice in ascertaining and applying a portion of customary international law, the law of war:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes...the status, rights and duties of enemy nations as well as of enemy individuals.

Ex parte Quirin, 317 U.S. 1, 27 (1942). As affirmed in *The Paquete Habana*, "International law is part of our law, and *must* be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[10]

The judicial power to identify, clarify and apply customary international law has a constitutional base. Under Article III, § 2, cl. 1 of the Constitution, not only might matters involving customary international law arise under other parts of the Constitution as such or treaties, but they can also arise as and under the phrase "the Laws of the

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[10]175 U.S. 677, 700 (1900) (emphasis added); *see also id.* at 708, 714 ("*bound* to take judicial notice of, and to give effect to" international law; "it is the *duty* of this court") (emphasis added). Concerning little known claims of the Executive, the actual holding in *Paquete Habana*, and more recent errors with respect to the rationale and ruling and misuse of the case, *see, e.g.*, Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994). *See also Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (O'Connor, J., opinion) (power "delegated by Congress to the Executive Branch" as well as a relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with...international law."); Paust, *International Law, supra*, at 143-46, and cases cited.

United States." As recognized by the first Chief Justice of the U.S. Supreme Court, this same phrase, "the laws of the United States," includes the customary "law of nations." *Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.). Thus, although treaties have an express constitutional base in Article III, a primary base for judicial incorporation of customary international law can be found in the phrase "Laws of the United States" contained in the same Article and also in Article VI, cl. 2, which affirms that both treaties and "the Laws of the United States" are "the supreme Law of the Land."

As the Restatement recognizes: "Matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law'...and is federal law." Restatement, *supra*, § 111, RN 4; *see also id.*, cmt. e; Paust, *International Law*, *supra*, at 6-7, 41-42 n.45, and numerous cases cited; Paust, *Judicial Power*, *supra* at 514-25. Thus, cases "arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution" (Restatement, *supra*, § 111, cmt. e); and such law, "while not mentioned explicitly in the Supremacy Clause," is supreme federal law within the meaning of Article VI, cl. 2 (*Id.* § 111, cmt. d). For these reasons, the phrase "laws...of the United States" contained in 28 U.S.C. § 1331 gives the district courts original jurisdiction over all civil cases arising under customary international law. Restatement, *supra*, § 111, cmt. e and RN 4; Paust, *International Law*, *supra*, at 6-7, 43 n.48, and numerous cases cited; Paust, *Judicial Power*, *supra* at 514-25. Thus, a general jurisdictional competence exists to apply customary international law as law of the United States (including "substantive" rights, duties, causes of

action, nonimmunity, and rights to remedies thereunder) under 28 U.S.C. § 1331 whether or not other statutes refer expressly to the "law of nations" or to customary international law and, thus, provide additional bases for federal jurisdiction or additional substantive law.

Throughout our history, fundamental human rights have also conditioned the meaning of due process under the Fifth Amendment (*see, e.g.*, Paust, *International Law*, *supra*, at 192-93, 196, 248 n.392, 254-55 n.459, and cases cited; *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388-89 (10th Cir. 1981)), and have been used as aids to interpret the content of other amendments (*see, e.g.*, Paust, *International Law*, *supra*, at 5-6, 34 n.37, 192-96, 246-55), especially the Fourth Amendment concerning unlawful seizures and detention (*see, e.g.*, *id.* at 195, 248 n.392, 251 n.425, quoting especially *Henry v. United States*, 361 U.S. 98, 101 (1959) ("arrest on mere suspicion collides violently with the basic human right of liberty.")). The very purpose of the Ninth Amendment was to guarantee unenumerated human rights to all of our citizens. As demanded and expected by the Framers, human rights are our own, *see, e.g.*, *id.* at 323-26, 331-35, 339-40, *passim*, and such human rights can also clarify the meaning of the Fifth Amendment. No one doubts that Mr. Padilla is entitled to due process of law under the Fifth Amendment. His customary and treaty-based fundamental human right to independent, fair, effective, and meaningful judicial review of the propriety of his detention should also be used as an aid for interpretation of the contours and meaning of his due process rights under the Fifth and Ninth Amendments. The U.S. Constitution has had significant impact abroad shaping human demands and expectations, particularly with respect to an evolved and

global meaning of due process under customary human rights law. For U.S. courts, evolved international due process requirements will be familiar.

Since international law is law of the United States in several senses noted above, the judiciary also has the power to take judicial notice of and, thus, to identify and clarify customary international law. *See* Paust, *International Law*, *supra*, at 7, 46-47 n.53, and cases cited. More importantly, such attributes of international law and judicial power compel recognition that the judiciary is bound to identify, clarify and apply customary international law in cases or controversies otherwise properly before the courts. As Justice Gray recognized in *Hilton v. Guyot* (and would reiterate in *The Paquete Habana*):

> International law in its widest and most comprehensive sense...is part of our law, and *must* be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasis added).

Similar recognitions have existed throughout our early history (*see, e.g.*, Paust, *International Law*, *supra*, at 8, 47 n.56, and cases cited), and have found expression in more recent federal opinions. *See, e.g.*, *id.* at 8, 47-48 n.57, and cases cited; *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. at 798-800. U.S. courts have also considered decisions of international courts and commissions as well as foreign courts addressing human rights in order to clarify human rights protected through our Constitution and various statutes. *See, e.g.*, Paust, *International Law*, *supra*, at 3-4,

19-21 n.17, 25-26 n.23, and cases cited; *see also Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (re: liberty interest, due process).

B. Judicial Power Is Recognized in Case Law

More specifically, issues concerning prisoner of war and other status, the propriety of detention, and provisional characterizations by the Executive during war have been reviewed by numerous courts according to international legal standards regardless of the alleged status of the detainee.[11]

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[11]*See, e.g.*, *Ex parte Quirin*, 317 U.S. at 25, 27 (whether or not so-called unlawful combatants); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (despite insistence "that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute," the Court concluded: "[i]t is not easy to see how he can be treated as a prisoner of war" under the facts); *id.* at 134 (Chase, C.J., dissenting) ("Milligan was imprisoned under the authority of the President, and was not a prisoner of war," thus demonstrating that the Court ultimately determines such status); *United States v. Guillem*, 52 U.S. (11 How.) 47 (1850); *The Nereide*, 13 U.S. (9 Cranch) 398, 429 (1815); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (regarding "access to the courts for determining the applicability of the law of war to a particular case," the Executive "could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man."), *cert. denied*, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142 (9th Cir. 1946); *United States v. Noriega*, 808 F. Supp. 791, 793-96 (S.D. Fla. 1992); *id.*, 746 F. Supp. 1506, 1525-29 (S.D. Fla. 1990); *Ex parte Toscano*, 208 F. 938, 942-44 (S.D. Cal. 1913) (Executive detention of belligerents from Mexico during a Mexican civil war was appropriate under Article 11 of the Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, T.S. No. 540, 36 Stat. 2310 (18 Oct. 1907), and was not

In response to claims in *Ex parte Quirin* that Executive

unreasonable under the circumstances, including "admitted facts"; habeas "petitioners are completely within the provisions" of the treaty; and it was the President's "duty to execute said treaty provisions."); *Ex parte Orozco*, 201 F. 106, 111-12 (arrest and imprisonment without trial of a person suspected of organizing an expedition against Mexico in violation of neutrality "merely upon an order directed by the President" were illegal and "[could not] be sustained in a court of justice," and "conditions then existing repelled the thought that the intervention of the military was necessary to the administration of justice," "civil courts...were competent to deal with all disturbers of the peace and with all persons offending against the neutrality," and it was the duty of the military to deliver the detainees "to the civil authorities"), 118 ("assaults of arbitrary power" are impermissible and despite the fact that the President "has earnestly and persistently endeavored to enforce" neutrality and "was actuated by the high motive to faithfully execute the laws," such considerations "should not affect the determination of legal questions" and, under the circumstances, there had been an "unlawful exercise of power") (W.D. Tex. 1912); *id.* at 111, also *quoting* 21 Op. Att'y Gen. 267, 273 (1895) ("'executive has no right to interfere with or control the action of the judiciary'" concerning "proceedings against persons charged with being concerned in hostile expeditions"); *In re Fagan*, 8 F. Cas. 947, 949 (D.C.D. Mass. 1863) (No. 4,604) (re: "persons detained under military authority as soldiers or prisoners of war, or spies," "[t]he writ of habeas corpus is unquestionably applicable to all these cases, and had long been actually and frequently used therein."); *In re Keeler*, 14 F. Cas. 173, 175 (D.C.D. Ark. 1843) (No. 7,637) (court will decide if detention is unlawful, will consider "the circumstances," and decide whether "reasonable grounds" support the habeas petition, but if "upon his own showing" petitioner is "clearly a prisoner of war and lawfully detained" denial of habeas is proper; moreover, "a strong case ought to be made out" by the petitioner so as not to unduly interfere with lawful military authority); *Juando v. Taylor*, 13 F. Cas. 1179, 1183 (D.C.S.D.N.Y. 1818) (No. 7,558) ("the parties in this war must be considered as regularly at war under...protection of the...laws of war; to be treated as prisoners of war"); *Respublica v. Chapman*, 1 U.S. 53, 59 (S.Ct. Pa. 1781) ("Those persons were, accordingly, treated as Prisoners of War."), and other cases cited in Paust, *Judicial Power*, *supra* at 518-25 & n.71, 525-26.

decisions are determinative and that, in any case, enemy aliens being detained should be denied access to courts (317 U.S. at 23), the Supreme Court was emphatic that "neither the [President's] Proclamation nor the fact that they are enemy aliens forecloses considerations by the courts of petitioners' contentions...." *Id.* at 25. Indeed, as *Ex parte Quirin* recognizes, legal status and rights under international law are matters of law within the ultimate prerogative of the judiciary. See also Part III.A.

U.S. courts have also made final determinations concerning the propriety of seizures of persons abroad in violation of international law[12] and have made final determinations concerning the seizure of enemy or neutral property in time of armed conflict, often in conflict with the determinations of the Executive branch.[13] In *Brown v.*

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[12]*See, e.g., Eord v. United States*, 273 U.S. 593, 606 (1927) (Executive branch violation of a treaty would affect jurisdiction); *United States v. Toscanino*, 500 F.2d 267, 276-79 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974) (also *quoting Shapiro v. Ferrandina*, 478 F.2d 894, 906 n.10 (2d Cir. 1973) (courts should assure "that the Executive lives up to our international obligations")); *United States v. Yunis*, 681 F. Supp. 909, 914-15 (D.D.C. 1988); *id.*, 681 F. Supp. 896, 906 (D.D.C. 1988) ("The government cannot act beyond the jurisdictional parameters set forth in principles of international law...."); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (Executive seizure, in violation of customary "international law" and a treaty, obviated jurisdiction and is "not to be sanctioned by any court"); Paust, *Judicial Power*, *supra* at 518-25 & n.72. *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.); *Cook v. United States*, 288 U.S. 102 (1933) (seizure of ship in violation of treaty).

[13]*See, e.g., The Paquete Habana*, 175 U.S. 677 (1900) (regarding illegal seizures and detention of enemy ships, cargo and crew outside the United States in time of armed conflict); *Brown v. United States*, 12 U.S.

United States, Justice Story affirmed that the President during war "has a discretion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers, or authorize proceedings, which the civilized world repudiates and disclaims." 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).[14] Later, in *Sterling v.*

(8 Cranch) 110 (1814); *The Flying Fish*, 6 U.S. (2 Cranch) 170 (1804); *see also Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *United States v. Lee*, 100 U.S. 196, 219-21 (1882); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314-16 (1870) (Field, J., dissenting) ("The power to prosecute war...is a power to prosecute war according to the law of nations, and not in violation of that law."); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (judicial determination of the propriety of a blockade and seizures under the laws of war, and the President "is bound to take care that the laws be faithfully executed," including the laws of war); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (The President cannot authorize seizure of a vessel in violation of a treaty); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (war's "extent and operations are...restricted by...the law of nations"); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417); *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the "law of nations, ...no proclamation of the president can change or modify this law"); 11 Op. Att'y Gen. 297, 299-300 (1865) (laws of war and more general laws of nations "are of binding force upon the departments and citizens of the Government" and neither Congress nor the Executive can "abrogate them or authorize their infraction."); Paust, *Judicial Power*, *supra*, at 518-25 & n.73; *see also* Paust, *International Law*, *supra*, at 143-46. *Bas* also involved a judicial determination whether a war existed and who was an "enemy." *See* 4 U.S. (4 Dall.) at 39 (Moore, J.), 40-42 (Washington, J.), 43-45 (Chase, J.), 46 (Paterson, J.).

[14]The majority did not disagree and affirmed that while exercising presidential discretion, the Executive can only pursue the law. See *id.* at 128-29 (Marshall, C.J.). For uniform views of the Founders and other cases recognizing that the President is bound by international law, *see,*

Constantin, the Court affirmed that the line between permissible discretion and law is one that must be drawn by the judiciary:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the... [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, ... is conclusively supported by mere executive fiat. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken... [but] the officer may show the necessity in defending an action... [before the judiciary].

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e.g., Paust, *International Law, supra*, at 143-46, 155-60 ns.6-38. *See also* former Legal Advisor, U.S. Dep't of State, Monroe Leigh, *Is the President above Customary International Law?*, 86 Am. J. Int'l L. 757, 760, 762-63 (1992) ("When the President orders a violation of customary international law,...he abuses his discretion and may be compelled by"...the courts to obey the dictates of customary international law.").

287 U.S. 378, 400-01 (1932).[15] The Court quoted *Mitchell v.*

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[15]Concerning the extent of judicial review, *see also id.* at 403: "the findings of fact made by the District Court are fully supported by the evidence"; *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972) (members of the Executive branch "should not be the sole judges" of their actions despite an Executive claim that a wiretap to gather intelligence was "a reasonable exercise of the President's power...to protect the national security." *Id.* at 299-301); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-47 (1948) (Jackson, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (Black, J.) ("'we cannot reject as unfounded the judgment of the military'" and there is "'ground for believing,'" *quoting Hirabayashi v. United States*, 320 U.S. 81, 99 (1943) (which also stated that in context, "[v]iewing these data in all their aspects," the political branches "could reasonably have concluded"; *id.* at 98)); *id.* at 234 (Murphy, J., dissenting) ("it is essential that there be definite limits to military discretion ... the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled...," next quoting *Sterling v. Constantin*, and adding: "The judicial test ... is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Court decided that there was not sufficient evidence to show that petitioners were levying war against the United States); *Ex parte Merryman*, 17 F. Cas. 147, 148-50 (C.C.D. Md. 1861) (No. 9,487); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 861 (2d Cir. 1943) (regarding Executive detention of an alleged German enemy alien, "[o]n these and any other disputed facts he is entitled to a judicial inquiry before the court can determine whether his relation to the German 'nation or government' brings him within the statutory definition of alien enemies."); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."); *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Haw. 1977) ("The Government should not have the 'discretion' to commit illegal acts.... In this area, there should be no policy option... [and] there is no exception to this rule for the acts of the CIA"); *Johnson v. Jones*, 44

Harmony, "'Every case must depend on its own circumstances.'" 287 U.S. at 401, *quoting* 54 U.S. (13 How.) 115, 134 (1851).

Judicial review of military actions taken under circumstances of claimed "necessity" during war has also occurred in other cases and involved contextual inquiry whether military actions were required, "reasonable," or plainly justified.[16] Thus, exercise of war or national security powers must not only fall within the limits of law, but also must not take exception in the name of "necessity" or under some theory that the end justifies the means. To this sort of claim, the Supreme Court gave an apt reply in *Ex parte Milligan*:

Ill. 142, 147-48, 160-61 (1867), *quoted* in *Ex parte Orozco*, 201 F. at 115-17; *supra* notes 12-14; *infra* note 17.

[16]*See, e.g.*, *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (when reviewed under the circumstances, a military order was recognizably arbitrary and void, the court adding: "It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires" as determined by the courts); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627-28 (1871) (judicial inquiry obtained whether there was "a state of facts which plainly lead to the conclusion that the emergency was such that it justified" an action); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851) (judicial review of military action involves inquiry whether there is "reasonable ground for believing" that a seizure is required and "it is not sufficient to show that he exercised an honest judgment...; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe...."); Paust, *Judicial Power*, *supra* at 518-25 & n.80; *see also* Paust, *International Law*, *supra*, at 143-46, and cases cited; *supra* notes 11-14.

> Time has proven the discernment of our ancestors.... Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.... The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence....

71 U.S. (4 Wall.) 2, 120-21 (1866). The Court also emphasized that precisely at such times "the President...is controlled by law, and has his appropriate sphere of duty, which is to execute... [and not violate] the laws," *Id.* at 121, adding: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers...." *Id.* at 119.

C. The Standard of Review Must Involve Independent, Fair, Effective, and Meaningful Judicial Review

As overwhelming trends in judicial decision and relevant international law demonstrate, the standard for judicial review must involve independent, fair, effective, and meaningful judicial review of the propriety of detention. See Parts II.B and III.A & B. It can be noted that the District Court in *Padilla* did not use such standards and provided far too much deference to the Executive when alleging that courts should only determine whether the Executive has presented "some evidence" to support detention without trial. 233 F. Supp.2d 564, 610 (S.D.N.Y. 2002). This is not the standard of proof. There must be inquiry into whether detention is reasonably needed under the circumstances. Further, in time of war, there must be independent inquiry into whether detention of certain aliens is absolutely necessary. See Part II.B; Paust, *Judicial Review*, *supra,* at Parts II.A.2 & C.2 and III.C.2. *Padilla II* rightly required access to a lawyer, rightly recognized his right to respond (including his right to present facts), and rightly recognized that there must be judicial review beyond the Executive's evidence (see 243 F. Supp.2d 42, 53-54, 56 (S.D.N.Y. 2003); Paust, *Judicial Review*, *supra*, at Part III.C.2), but the "some evidence" standard, even as expanded, is not the correct standard. The District Court also assumed in error (per dicta) that if Padilla had been captured abroad in a zone of active combat operations that he would have no right to present facts. 243 F. Supp.2d at 56-57. *Compare* cases *supra*, notes 15-20. Statements in *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003), clearly contrary to venerable

Supreme Court precedent noted herein, that Hamdi was "not entitled to challenge the facts presented" by the Executive and that judicial "inquiry must be circumscribed to avoid encroachment into...military affairs" (*id.*. at 473), were clearly in error and threatening to civil liberties. There must be a proper check on Executive power in wartime based upon law when liberty and other legal rights are directly in peril, as required by independence and responsibilities of the judiciary under Article III of the Constitution, the Fifth Amendment, and various international laws noted above.

CONCLUSION

For the foregoing reasons, we support the decision of the Second Circuit in *Padilla*. Further, the legal errors and misstatements by the District Court in *Padilla* concerning judicial review of the propriety of detention and standards for judicial review should not guide inquiry, and proper legal standards for independent, fair, effective, and meaningful judicial review should be utilized.

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